Supreme Court, U.S.
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In the
Supreme Court of the United States

Karl T. Hoyle,
Petitioner

v.

National Credit Union Administration, Yolanda T. Wheat; Dennis Dollar and William E. Reukauf,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Petition for Writ of Certiorari

Dennis M. Hart
Butera & Andrews
1301 Pennsylvania Avenue N.W.
Washington, D.C. 20036
202.347.6875

28 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the panel opinion of the Fourth Circuit Court of Appeals improperly expands the power of an Executive Branch agency by misreading the authorizing statute and inferring powers to its Board of Directors which are not justified by the underlying legislation?

2. Whether the panel opinion of the Fourth Circuit Court of Appeals is in conflict with the holdings of other circuit courts and decisions of this Court when it permits the termination of federal employment by an authority which was not responsible for the hiring of that employee?

PARTIES INVOLVED

The following individual appeared as plaintiff in the United States District Court for the District of Columbia and the Eastern District of Virginia and as an appellant in the United States Court of Appeals for the Fourth Circuit: Karl T. Hoyle.

The following Executive Branch Agency appeared below as a defendant in the United States District Court and as an appellee in the United States Court of Appeals for the Fourth Circuit: National Credit Union Administration.

The following individuals appeared as defendants in their individual and official capacities as Members of the Board of the National Credit Union Administration in the United States District Court and as appellees in the United States Court of Appeals for the Fourth Circuit: Yolanda Townsend Wheat and Dennis Dollar.

The following individual appeared as a defendant in his individual capacity and in his official capacity as Acting Special Counsel for the National Credit Union Administration in the United States District Court and as an appellee in the United States Court of Appeals for the Fourth Circuit: William E. Reukauf.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on April 25, 2001, affirming the decision of dismissal entered by the United States District Court for the Eastern District of Virginia.

Opinion Below

A panel of the United States Court of Appeals for the Fourth Circuit issued an unpublished opinion on April 25, 2001, which affirmed the dismissal decision of the United States District Court for the Eastern District of Virginia. The district court decision was announced from the bench without any written explanation. A copy of the opinion of the court of appeals is reproduced at Appendix A.

Jurisdictional Statement

The Court of Appeals for the Fourth Circuit entered its opinion on April 25, 2001. This Court has jurisdiction of this direct appeal pursuant to 28 U.S.C. 1254(1).

Constitutional Provision

Amendment V (1791) "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Statutes Involved

The statutes involved are the Federal Credit Union Act, 12 U.S.C. 1751-1766. The pertinent portion of the statute is 12 U.S.C. 1766(i) and is reproduced in Appendix B.

Statement of Facts

Petitioner seeks review of the April 25, 2001, judgment of the United States Court of Appeals for the Fourth Circuit

which affirmed the decision of the district court to dismiss his complaint which alleged violations of due process in the termination of his employment at the National Credit Union Administration (NCUA). The holding of the opinion below is in conflict with decisions of this Court and other circuit courts and requires resolution by this Court.

In addition, the decision below requires review by this Court because it expands the power of an Executive Branch agency by misreading the authorizing legislation.

Petitioner, Karl T. Hoyle, brought this action against the Respondents, served in their official and individual capacities, alleging that his federal employment was terminated in violation of civil rights secured by the United States Constitution when his appointment as the Schedule C Executive Director of the NCUA was involuntarily terminated by persons other than those who appointed him to that position. Petitioner contends that he was appointed to that position by the Chairman of the NCUA Board and that he can be terminated only by that appointing authority. The Chairman voted against the decision to terminate him. The Respondents' motion to dismiss (which the Court of Appeals treated as a motion for Summary Judgment) was granted by United States District Judge Leonie M. Brinkema, which the Petitioner appealed.

The position of Executive Director of the NCUA to which Petitioner was appointed in December 1993, is a Schedule C Position within the United States Government, requiring the approval of the White House through the Office of Personnel Management (OPM). On May 12, 1994, Petitioner's appointment to the Executive Directorship of the NCUA was approved by the White House and OPM, resulting in his temporary Schedule C appointment being converted to a permanent Schedule C position.

Petitioner was selected for both the temporary and permanent Schedule C appointments as NCUA Executive Director by the Chairman of the NCUA, Mr. Norman E. D'Amours. As the Executive Director of the NCUA, Petitioner Hoyle reported to the Chairman of the Agency, Norman E. D'Amours. Petitioner's OPM Forms 1019 (Information on Schedule C Position and Incumbent), dated December 10, 1993 and April 12, 1994, are signed by Norman E. D'Amours, as the Agency "Head." These Forms also list the "Title of Incumbent's Supervisor" as "Chairman, NCUA. " The Position Description (SS-301-00) accompanying Petitioner's OPM Forms 1019 denotes the position as "the Executive Director to the Chairman of the Board, Norman E. D'Amours," and the Petitioner's official NCUA biography states that he was appointed by NCUA Chairman D'Amours.

At no time did the appointment of the Petitioner to the position of NCUA Executive Director require the approval of the other NCUA Board Members and no such action was ever taken. At no time did the President of the United States or the OPM direct that Petitioner be terminated. On January 21, 1998, the NCUA Board of Directors adopted a motion to terminate Petitioner by a 2-1 vote of its three members. The Chairman of the Board, who was the Petitioner's appointing authority, voted against this motion. Petitioner's employment as NCUA Executive Director terminated on February 23, 1998.

On January 19, 1999, Petitioner filed an action in the United States District Court for the District of Columbia seeking reinstatatement. Pursuant to a venue objection, the matter was transferred to the Eastern District of Virginia, which granted a Rule 12(b) motion by the Respondents/defendants on July 28, 2000. On April, 25, 2001, that decision was affirmed by a panel of the Fourth Circuit in an unpublished opinion.

(Appendix A). There was no petition for re-hearing or re-hearing en banc.

REASONS FOR GRANTING THE WRIT

I

THE PANEL DECISION INCORRECTLY EXPANDS BY JUDICIAL FIAT THE POWER OF THE BOARD OF DIRECTORS OF THE NATIONAL CREDIT UNION ASSOCIATION

Petitioner submits that the Fourth Circuit decision below improperly expands the power of the Board of Directors of the NCUA. This expansion of power is not justified by the statutory references relied upon by the Circuit decision and is an unwarranted expansion of administrative control and serves as authority for future conflict and confusion in the administration of executive agencies.

1. History of the NCUA

In 1934 the original Federal Credit Union Act was signed into law and authorized the establishment of federally chartered credit unions in all states. Supervision was initially the responsibility of the Farm Credit Administration and through the years was transferred to various federal agencies, including the Federal Deposit Insurance Corporation and the Department of Health, Education and Welfare. As credit unions grew, the need for more formal supervision became apparent and in 1970 the National Credit Union Administration was

created to charter and supervise federal credit unions and the National Credit Union Share Insurance Fund. Prior to 1978, the agency was headed by a single Administrator who was assisted by an advisory board. As part of the Financial Institutions Regulatory and Interest Rate Control Act, a Board of Directors was created and the post of Administrator became the Chairman of the Board. The legislative history indicates that a Board was created to conform to the typical operation of other financial institutions. House Report No. 95-1383, 1978 U.S.C.C.A.N. 9273, 9298.

2. The Fourth Circuit Decision Incorrectly Interprets the Federal Credit Union Act.

Contrary to the conclusion of the Fourth Circuit, the Board of Directors is not "head of the NCUA". Nowhere in the statutory language is such a designation made. As Petitioner demonstrated below, the personnel documents of Petitioner list the Chairman of the Board as the head of the agency and his appointing authority. Although the statutory language which created the Board did give it executive powers, these powers were not made exclusive to the Board. See 12 U.S.C. 1766. Moreover, this delegation of power must be viewed in the context of an agency which traditionally had been directed by a single Administrator who was renamed as Board Chairman in the1978 legislation.

While Petitioner agrees with the principle relied upon by the Fourth Circuit that the body who has authority to hire also has the authority to fire, he reaches a far different conclusion than the court did below. Contrary to the Fourth Circuit's decision, the Board does not have the "clear authority" to hire an Executive Director for the NCUA. (Slip Opinion p. 3) Despite the Fourth Circuit's inference, nowhere in the statute is

this authority mentioned and by no legitimate stretch of the imagination can it be claimed that the appointment of Executive Director is the sole responsibility–or even co-responsibility--of the Board of Directors.

It is undisputed that the Petitioner was appointed Executive Director by the Chairman of the NCUA. It is also agreed by all parties below that this appointment did not require the approval of the Board to become effective. Significantly, there has never been an argument raised that the Chairman himself did not have the authority to select and appoint the Petitioner to his position. By the Fourth Circuit's own logic, if the Board did not hire the Petitioner, it could not fire him. The stretch by the Fourth Circuit to justify this usurpation of authority cannot be justified by the Federal Credit Union Act.

Finally, Petitioner would note that although statutory language on this matter is silent on the exact language of personnel control, the internal rules of the NCUA are not. These internal procedures, found in the Personnel Management Delegation of November 27, 1995, contradict the Fourth Circuit premise and restricts the NCUA Board from any authority to control the personal staff of other Board Members. (NCUA HR 1) The Fourth Circuit refused to address this question.

The Petitioner's complaint in the District Court was dismissed because the Fourth Circuit agreed that there was "clear authority" to terminate his employment by the Board of Directors when the appointing authority wished to retain him in that position. Once this "clear authority" evaporates, the claim of wrongful termination becomes a viable trial issue which should have been permitted to be litigated.

II

THE PANEL DECISION IS IN CONFLICT WITH THE D.C. CIRCUIT'S DECISION IN *NATIONAL TREASURY EMPLOYEES UNION*

Petitioner relied in his argument to the Fourth Circuit upon the decision by the District of Columbia Circuit in *National Treasury Employees Union v. Reagan*, 663 F.2d 239 (D.C. 1981) It is significant to note that the Fourth Circuit declined to address this issue in its opinion. Petitioner submits that despite the silence of the court below, the conflict between *National Treasury* and the decision in this case remains.

In *National Treasury Union*, the D.C. Circuit addressed the problem of what rights individuals had who had been formally notified that they had been selected for Federal employment but were subsequently caught in a Federal hiring freeze under which the President revoked their appointment. In reaching the conclusion that these employees had no rights, the Circuit Court found that the revocation of appointment was properly executed. In order to do this, the court examined the nature of federal hiring and termination authority.

In doing so, *National Treasury Union* relied upon this Court's decision *In the Matter of Hennen*, 38 U.S. 230, 13 Pet. 230 (1839), in which the power to remove a clerk of a court was considered. In that case, this Court concluded that "[I]t would seem to be a sound and necessary rule, to consider the power or removal as incident to the power of appointment." *Id.* at 259.

Hennen, in turn was based on the seminal decision of this Court in *Marbury v. Madison*, 5 U.S. 137 (1803) in which

Chief Justice Marshal examined the federal appointment process in some detail and wrote that a revocable commission of federal employment allowed the executive who appointed the employee to terminate the employment at any time. 5 U.S. at 45-46. The reference in *Marbury* that only the appointing executive could terminate the appointment of employment was explicitly recognized in *Hennen* and has served as the basis for the repeated acceptance of that principle by all courts. *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 896 (1961)("It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.") *reh'g denied*, 368 U.S. 869 (1961)

Numerous early decisions by this Court established the now unquestioned principle that the right to remove from office is incident to the power to appoint. *Reagan v. United States*, 182 U.S. 419 (1901); *United States v. Allard*, 155 U.S. 591 (1895); *Blake v. United States*, 103 U.S. 227 (1881).

National Treasury Union went on to summarize the ruling in *Hennen* with the principle that "The only one authorized to revoke an appointment is the one authorized to make it. . . ." 663 F.2d at 247. The *National Treasury Union* opinion then considered a situation analogous to the present case and wrote that, "Thus, for example, an appointment authorized to be made by the Secretary of Defense, and in fact, made by the Secretary of Defense, cannot be revoked by the President" *Id.* at 247. The ultimate conclusion of *National Treasury Union* that, "[T]he power to remove is held by the appointing authority, and only by the appointing authority." *Id.* at 247, remains the current state of the law.

The Fourth Circuit opinion in this case attempts to detour around this principle by claiming that if the Board could have appointed an executive director, then it had the power to terminate him even if it did not actually do the appointing. Because of the historically strong link between appointment and termination, this fuzzy reasoning of the court below places its conclusion in conflict with the circuit decision in *National Treasury Union* as well as the decisions of this Court upon which *National Treasury Union* relies.

Petitioner submits that the prospect of enlarging the power to dismiss federal employees is a dangerous one in that it places the ultimate control of an employees fate--and thus control over their decision making–into the hands of those whom the legislature did not authorize. This Court has recognized that the power of removal is a potentially "coercive influence" which "threatens the independence of a commission. . . ." *Humphrey's Executor v. United States*, 295 U.S. 602, 630 (1935). Nor is this matter an isolated example. It occurs on a recurring basis in administrative agencies.[1]

This Court has long concluded that Due Process is a flexible concept that calls for procedural protections as the particular situation demands. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). It is meant to insure basic fairness and applies to the government in its relationship to its employees. *See, e.g. Greene v. McElroy*, 360 U.S. 474 (1959). Petitioner submits that fundamentals of basic fairness require that he be able to challenge an action for employment termination when that termination is performed by someone other than that who hired

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1 See resignation letter of Ellen Seidman, Director of Office of Thrift Supervision, Department of Treasury, July 3, 2001. Correspondence may be found at www.ots.treas.gov/docs/48859.pdf.

him and is contrary to the rules of the agency. A ruling which insulates that type of behavior is contrary to the settled decisions of this Court and circuit opinions and interjects the potential for disruption of the orderly administration of executive agencies.

CONCLUSION

Petitioner submits that the decision of the Fourth Circuit must be reviewed because it improperly expands the power of an Executive Branch agency without legislative support. In addition, the decision is in conflict with long standing principles of this Court on federal employment and conflicts with other circuit court decisions.

Respectfully submitted,

Dennis M. Hart
Counsel for Petitioner
Butera & Andrews
1301 Pennsylvania Ave. N.W.
Suite 500
Washington, D.C. 20004-1701
202.347.6875